Why Egenberger Could Be Next

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I.

"Is Egenberger next?", Martijn van den Brink asks in an article on the *Verfassungsblog*. I do not want to go into details of the constitutional proceedings of the constitutional complaint in the Egenberger case here, but rather want to broaden the view and thereby place the pending constitutional complaint in a broader context: The case law of the European Court of Justice in cases involving religion in recent years. I was given the opportunity to present a few observations on this at a conference in March this year. They show that the jurisprudence of the ECJ on matters concerning religion does raise a number of problems in the overall picture. The constitutional complaint in the Egenberger case at least offers the Federal Constitutional Court the opportunity to address critical questions to the ECJ – either in the form of a new request for preliminary ruling or in the form of a decision.

II.

When European law which is not specifically aiming to be applied on religion encounters religiously shaped cases, it works "normally". This finding, which was already formulated in the 1990s, is still true. Under these auspices, European law effects all dimensions of the state-church law of the member states. Missionary activity is limited by data protection law (*Tietosuojavaltuutettu*, Case C-25/17). Religious rites must comply with European animal protection (*Liga van Moskeeën*, Case C-426/16). State support for religious schools must be measured against the law on state aid (*Congregación de Escuelas Pías Provincia Betania*, Case C-74/16).

The guarantee of freedom of religion (Art. 10 EU Charter of Fundamental Rights), which is included in primary law by the Treaty of Lisbon, and the reserves of competence of the Member States guaranteed by primary law (Art. 17 TFEU), too, play at best a subordinate role in the judicial practice of the ECJ for the interpretation and application of religion-unspecific European law. However, it is the very Article 17 TFEU that would have opened up the possibility of establishing functional equivalents to the scope for assessment in human rights issues recognised by the European Court of Human Rights.

Moreover, the dogmatics of religious freedom is little elaborated. The religion-specific effect of "general" and in this sense "neutral" regulations is not considered in terms of the intensity of the restriction of freedom, as the cases on slaughter and data protection show. The neutrality of the reasons for imposed obligations shall exclude an interference with freedom of religion. A justification of this position, which is intensively and critically discussed in international literature on comparative law and on the human rights protection of religious liberty, is sought in vain.

Possibly, the ECJ has so far lacked the case material that would help to sharpen its awareness of freedom of religion issues, as well. Thus, for example, the European Court of Human Rights has only gradually intensified the protection of corporate freedom of religion according to Article 9 ECHR, most recently in particular under the impression of cases in Central and Eastern Europe in which the state theology of Orthodoxy or communist religious policy had an effect.

III.

The effects of European law that is not specifically aiming on the regulation of religious activities must be distinguished from cases of anti-discrimination law. Here, the Union is competent due to Article 19 TFEU, which is supported by Article 21 of the EU Charter of Fundamental Rights, which has been charged with the task of creating a sort of super-fundamental right. Alexander Tischbirek has recently lucidly argued (in *Der Staat 58 (2019), p. 621 et seq.*) that EU religion law is shaped by a paradigm of equality law. Institutions under state-church law which interfere with union anti-discrimination law must not hope that special consideration will be given to historical imprinting or religious-cultural peculiarities. So far, only the freedom of enterprise as a justification for a secular business policy has proven to be compliant to "anti-discrimination law" (*Achbita*, Case C-157/15; *Bougnaoui, Case C-188/15*). Religiously distinct intermediary institutions thus come under pressure (*Egenberger*, case C-414/16; *IR v. JQ*, case C-68/17).

It is not apparent that the Court of Justice reflects on the consequences of its own rulings in terms of religious culture, whether it is to safeguard the profile of religious institutions by means of loyalty requirements and denominational clauses, or to ban headscarves in the workplace or to interfere with the holiday culture of a Member State (*Cresco Investigation GmbH*, Case C-193/17). This ignorance of the socio-cultural implications of its own case law makes traditional forms of „ethos management“ by the state in the religious field difficult.

Some might even welcome this development: The age of European bi-confessionalism has long been overcome and the arrangements that remind us of it, remnants of formerly religiously pillarised societies, shall be grinded, they will say. Whether one tells the Europeanization of religious law as a history of loss or progress: European anti-discrimination law, when deliberately used against the religious-law institutions of the Member States, is in any case proving to be an extremely effective battering ram.

IV.

The transformational potential inherent in European fundamental rights is only beginning to become visible. A data protection case from Finland clearly shows how missionary activity in Member States, the core content of religious freedom, has to respect the level of protection of European fundamental rights of privacy. The classification of conflicting legal interests in the Member States is no longer relevant here. The concordance between conflicting rights will be established at European

level, possibly even if the Member States agree otherwise in secondary law (this will be demonstrated by a case on the absolute prohibition of kosher slaughter; submission by the *Grondwettelijk Hof*, Case C-336/19).

The scope of application of the Charter of Fundamental Rights (and thus Article 51(1) of the Charter) becomes an essential starting point for the Union's overlapping of the state-church law of the Member States. Especially with Union law that is not specifically aiming to regulate religion, the Member States' emphases on freedom of religion are covered up, if and insofar as the scope of application of secondary law also opens up the application of the Union's fundamental rights regime. The parallel application of fundamental rights of Member States by national courts has so far only been accepted by the European Court of Justice in constellations where the primacy and effectiveness of Union law was not impaired.

V.

The *Recht auf Vergessen I* decision of the First Senate of the Federal Constitutional Court can be read as a reaction to precisely these effects: One tries to defend national fundamental rights while respecting the primacy of European law. In *Recht auf Vergessen II*, the First Senate expressly emphasises that the coordinates of constitutional law on the European integration developed in previous case law (*ultra vires*, constitutional identity, comparable protection of fundamental rights) continue to prevail. This also applies to the assignment of basic principles of religious constitutional law to the core of democratic self-government in Germany, which is guaranteed by the Basic Law and forms a constitutional identity.

For their part, many other Member States have constitutional reservations about the primacy of European law. Such conditions and limits imposed on integration issues concern, in very different details, the protection of fundamental rights, the transgression of Union competences or the respective constitutional identity. The potential for conflict inherent in such reservations has now been demonstrated by the decision of the Second Senate of 5 May 2020 on the ECB's purchasing programme.

Most cases from the recent case law of the European Court of Justice referencing to religion are not of the same quality as those that evoke fundamental conflicts on European integration according to constitutional law. The member states do not necessarily experience the transformation of religious law under European law as negative, but also use it for their own policies. The case on Austrian holiday law could have been different. But in Austria, one gets the impression that one is less offended by the European Court of Justice than by the political reaction of the ruling majority in Austria.

Still one problem remains: The Member States' strategy, which is connected with Art. 17 TFEU, to safeguard autonomous spaces for shaping religious law with means of a primary law clause, has proved to be a failure in the case practice of the European Court of Justice. At the political level, in hearings and negotiations on legislative formulations in the Commission and Parliament, Article 17 TFEU can be used, as the history of the development of the Basic Data Protection Regulation shows.

In the European jurisdiction, however, the hoped-for caution and the necessary consideration of the repercussions of Union law for cases interfering with religion has not been sufficiently taken into account.

The European Court of Justice lacks dogmatic subtlety and sensitivity with regard to religion and cultural policy. This grievance is beyond the direct influence of the Member State governments. This is why the supreme and constitutional courts come into play. In their own way, they can enter into dialogue with the ECJ and make it clear that a certain sense of religion and its manifold forms of inculturation is necessary in order to avoid a superunitarization of the Member States' religion law systems and at the same time to keep European institutions capable of acting in the long term on the normative basis of equal freedom.
